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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

KMART CORPORATION, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Trial Court erred and abused its discretion when it denied petitioner's motion for leave to amend her complaint (which was originally filed in State court and removed to Federal court by the defendant corporation) to add as a defendant the non-diverse store manager and the non-diverse corporation that was the owner and/or operator of the K-Mart store in Chalmette, Louisiana, when Louisiana law had only recently been clarified to provide that a store manager could be held liable for unreasonably dangerous conditions upon store premises and federal district courts had consistently construed petitions naming store managers as defendants to be a fraudulent joinder to avoid diversity jurisdiction of the federal courts, thus denying the plaintiffs the benefit of the State forum they had selected when they initiated their claim?

2. Whether the Trial Court erred and denied petitioner a fair trial when it refused to instruct the jury according to Louisiana law that causation of an injury may be established upon the basis of proof of a plaintiff's good health before an accident and proof of injuries that could possibly have been caused by an accident of the type alleged by the plaintiff?

3. Whether the Trial Court erred in excluding the testimony of safety experts concerning the unlikelihood that a store patron would have seen the clear, small puddle of bubble bath on a mottled green flecked tile floor while shopping, and in denying petitioner's motion for alternative post-verdict relief from the jury's determination that petitioner was 25% responsible for her injuries (either upon a motion for a judgment *non obstante veredicto* or a motion for a new trial), when there was no evidence before the Trial Court upon which a valid determination of comparative fault could have been

made under Louisiana law--the substantive law the Federal District Court was bound to apply in this case arising under its diversity jurisdiction?

4. Whether the Trial Court erred in denying such post-verdict relief to Mr. Hernandez on his loss of consortium claim when he and Mrs. Hernandez testified, without contradiction, about the nature and extent of their pre-accident marital activities and the substantial differences produced by Mrs. Hernandez's injuries?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were Toni Decossaf Hernandez and Sherman Hernandez, plaintiffs, and K-Mart Corporation, defendant. Plaintiff also sought to add as parties defendant two non-diverse parties, *viz.*, K-Mart #3387, Inc., a Louisiana corporation that is a subsidiary of defendant K-Mart Corporation, and John Galloway, the store manager, both of whom have an interest in the outcome of this Court's decision of this case.

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IN THE

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OCTOBER TERM, 1993

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versus

K-MART CORPORATION, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit entered in this action on May 19, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. A-1 through A-8, *post*) is unreported. That unreported opinion is referenced in a "Table of Decisions Without Reported Opinions" appearing at 993 F.2d 1543 (Table). The Trial Court's Minute Entry, dated January 3, 1992 and entered on January 7, 1992, denying petitioners' motion for leave to amend their complaint to add non-diverse parties and to remand this case to the State court from which it had been removed, is unreported. It is annexed hereto as "Appendix B," p. A-9, *et seq., post.* Also unreported is the Trial Court's written Order and Reasons denying petitioners' alternative motions for post-verdict relief, which was entered in these proceedings on April 16, 1992. It is annexed hereto as "Appendix C," p. A-13, *et seq., post.*

JURISDICTION

The opinion of the Court of Appeals was entered on May 19, 1993. (Appendix A, *post*) A timely petition for rehearing was filed on June 14, 1993. On June 25, 1993, the Court below denied petitioner's petition for rehearing without considering the supplement thereto. (Appendix D, p. A-25, *post*) This petition is filed within ninety days of the date of the order denying petitioner's petition for rehearing.

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules with which this case is involved are set forth in Appendix E, pp. A-26 *et seq.*, *post*. They are: 28 U.S.C. §§1332(a), 1441(a), 1447(c) and 1447(e); Rules 701 and 702, F.R.Evid.; Rule 15(a), F.R.C.P.; and La.R.S. 9:2800.6--all as construed in the

applicable jurisprudence of the United States and the State of Louisiana.

STATEMENT OF THE CASE

On July 26, 1989, Toni Hernandez was shopping in a K-Mart store[1] in Chalmette, Louisiana. In the section of the store where health and beauty aids were displayed for sale, Mrs. Hernandez was looking at merchandise. She then turned away from the shelves and started to walk down the aisle. She stepped into a small, clear puddle of Sesame Street Bubble Bath. Her foot slipped and she fell, but she was caught by her husband before she hit the floor. She twisted her back and her ankle.

The vinyl tile flooring in that section of the store was a mottled green color with green flecks in it. The color of the floor made it difficult for a customer engaged

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[1]She was shopping in K-Mart #3387 in Chalmette, Louisiana. K-Mart #3387, Inc. is a Louisiana corporate subsidiary of K-Mart Corporation. The plaintiffs are Louisiana citizens.

in shopping to see a small clear puddle of liquid on it.[2] Despite the potential hazard from such slippery substances leaking on the floor, the store did not undertake to place skid-resistant carpets, mats or other protective devices upon the floor to absorb such spilled substances. Thus, the risk of a slip and fall hazard in that area of the store was highly likely to be encountered by customers. The store did not detail personnel to keep vigilance in that area, consistent with the risks that were likely to be encountered by its patrons. Rather, the

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[2]Plaintiff listed two experts to testify before the jury with regard to the nature and extent of the hazard created by the deposit of a clear slippery substance upon the tile floor as well as the unlikelihood that such a substance would be seen by a customer who was occupied with shopping. The Trial Court excluded that evidence, contending that the jury did not need such testimony. The error of the Trial Court's ruling on the admissibility of their testimony is made a basis for this petition because the jury found Mrs. Hernandez to have been 25% responsible for the accident. The error of the exclusion of that testimony is limited to the issue of plaintiff's comparative negligence since the jury found K-Mart to have been liable to the plaintiff and 75% responsible for all of the injuries she sustained in the accident.

manager generally delegated to all employees the duty of discovering and correcting such premises hazards while they were incidentally performing their other duties near such hazards.

Ms. Camille Hebert, a K-Mart employee who witnessed Mrs. Hernandez's fall from a short distance away, did not see the liquid on the floor before Mrs. Hernandez slipped in it. When Mrs. Hernandez pointed out to Ms. Hebert the small puddle of liquid on which she had slipped, Ms. Hebert discovered even more of the spilled liquid a few feet away from the place where Mrs. Hernandez slipped. It was store policy that all of the employees were charged with the responsibility of observing such hazards when they were in the area and when such hazards were thus discovered, either to clean them up or to see that they were cleaned up before they left the area. No one was assigned to inspect the aisles regularly. No one did. Ms. Hebert's testimony that she

was in the area and did not see the substance on the floor before Mrs. Hernandez' fall shows the defectiveness of K-Mart's method of delegating to everyone the obligation of incidentally finding and correcting such hazardous conditions without undertaking task-specific, regularly scheduled inspections of the aisles for such hazards.

On the date of the accident, Mrs. Hernandez was taken to a local hospital emergency room where she was examined. She then complained of pain in her low back and left ankle. The emergency room physician ordered plain x-rays and rendered palliative treatment. He referred Mrs. Hernandez to an orthopedist for further evaluation and treatment.

Mrs. Hernandez was treated by orthopedists for approximately seven months for her low back condition, which was diagnosed as a lumbar sprain. She was treated with traction and medication for her back problem

during that period. After that problem became resolved and Mrs. Hernandez continued to complain about persistent ankle pain, Dr. McLaughlin ordered a CAT scan and bone scan of her left ankle and foot. Those examinations revealed the existence of a cyst in the posterior portion of her left talus that communicated with the subtalar joint. An x-ray taken on the date of the accident had revealed a spot that could not be definitely identified by plain x-ray techniques. That was the cyst. Thus, the cyst clearly pre-existed the accident. But Mrs. Hernandez had never had any ankle or foot symptoms before the slip at the K-Mart store. The symptoms that developed after she twisted her ankle persisted from the time of her slip at the K-Mart store until after she was operated on in February of 1990 to excise the cyst and to insert a bone graft taken from her hip.

Dr. McLaughlin testified that an accident of the type sustained by Mrs. Hernandez could change the

structures of a cyst and cause the onset of symptoms, as she had experienced in this case. He observed that the onset of symptoms at the time of her injury to her left ankle showed a causal relationship between the accident and the condition for which she required medical treatment, *viz.*, the symptoms caused by the aggravation of the cyst. Even the defendant's expert orthopedic surgeon, who was retained only to render testimony and not treatment, testified that there was a 50-50 chance that the slip and twisting of Mrs. Hernandez's ankle aggravated the cyst and made it become symptomatic, thus requiring the surgical treatment she was provided.

The parties stipulated that the medical bills incurred by Mrs. Hernandez equalled $20,916.58. Defendant K-Mart explicitly reserved its right to dispute, and it vigorously disputed, the issue of the causal relationship between the injuries and/or conditions that were treated and the slip by Mrs. Hernandez at its store. The

jury, however, awarded all of the stipulated medical expenses to Mrs. Hernandez. Thus, the jury found that all of those conditions were causally related to the accident at K-Mart.

At the Pre-Trial Conference that was conducted immediately before trial, plaintiffs' counsel advised the Trial Court of his intention to file a motion to remand this removed case to the State Court on the basis that the jurisdictional amount of $50,000, exclusive of interest and cost, was not in controversy. Plaintiff was ordered by the Trial Court to file a memorandum in support of such a motion before trial. Plaintiff's counsel, after researching the issue of remand based on the absence of jurisdictional amount, moved for remand to State court on the additional basis that plaintiffs should be granted leave to amend their petition to add two non-diverse defendants against whom plaintiffs had viable claims under Louisiana law. That amendment would have de-

stroyed complete diversity, and it would have required a remand of this case pursuant to 28 U.S.C. §1447(c and e), as then recently amended. Plaintiff filed a motion for leave to amend the petition and tendered a proposed amending petition, incorrectly using the State Court caption instead of the Federal Court caption. By Minute Entry dated January 3, 1992 and entered on January 7, 1992, the Trial Court denied plaintiffs' motion for leave to amend their original petition and to remand this cause to the State Court on the ground that plaintiffs sought to amend their suit beyond the expiration of the delays provided by the Court's Rule 16 Scheduling Order. That ruling was made despite the plaintiffs' demonstration that the decision upon which they relied to establish the viability of the State law claim against the store manager had been decided by the Louisiana Supreme Court after

the said cutoff date[3] and that other federal courts in Louisiana had declined to remand cases against store managers to the State Courts before that decision.[4] That ruling was also made despite the showing by plaintiffs that the discovery of the existence and identity of the other non-diverse defendant, a Louisiana corporation named K-Mart #3387, Inc., had occurred only

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[3]As shown by the Trial Court's ruling on petitioners' motion for leave to amend and to remand, the deadline for amending the complaint after its removal to the Federal courts was August 2, 1991. Appendix B, p. A-10, *post*. The decision which clarified Louisiana law to establish the existence of a cause of action against the store manager was not rendered until after the expiration of the amendment cutoff date. *Holmes v. Great A. & P. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. Sept. 26, 1991), *writ den.*, 592 So.2d 412 (La. Jan. 31, 1992).

[4]*See, e.g., Elder v. Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D.La.1990); *Freeman v. Wal-Mart Stores, Inc.*, 775 F.Supp. 208, 209 n. 1 (W.D.La.1991). In *Freeman,* Senior Judge Hunter acknowledged that he had recently refused to remand a case to State court when a claim had been made against a non-diverse store manager and that the analysis in *Holmes v. Great A & P Tea Co., supra,* caused him to change his position *vis-a-vis* the legitimacy of a claim made against a store manager which would defeat federal diversity jurisdiction.

recently and plaintiffs did not then know the full extent of that defendant's duties that would make it liable for the risks encountered by Mrs. Hernandez in the K-Mart store #3387.

During the trial, the Trial Court refused to instruct the jury, according to *Housley v. Cerise,* 579 So.2d 973 (La.1991), as follows:

> You may presume that Mrs. Hernandez's injury resulted from her slip in K-Mart if you are satisfied that before the accident she was in good health, but following the accident the symptoms of her disabling condition appeared and continuously manifested themselves afterward[,] providing that the medical evidence shows that there was a reasonable possibility of causal connection between the accident and the disabling condition.

There was evidence of the pre-existence of the cyst, but there was also evidence that the cyst was asymptomatic before the accident sued upon. There was evidence that the cyst became symptomatic concurrently with the occurrence of the twisting of Mrs. Hernandez's ankle and that it persisted until surgically corrected by the excision

of the cyst and transplantation of a bone graft from her hip into the space left by the excision of the cyst. Medical testimony showed that the accident, occurring as the plaintiff described it, could produce changes in the pre-existing cystic structure that could make the cyst become symptomatic. Dr. McLaughlin testified that the surgical treatment rendered for the cyst was made necessary because of the symptoms that were historically related to the slip and twisting of plaintiff's ankle at the K-Mart store. The objection to the denial of that requested instruction was renewed in plaintiffs' motion for post-verdict relief, based upon the contention that the denial of the requested instruction affected the jury's determination of quantum because of the circumstantial nature of the proof of causation and the absence of instructions upon the proof required to establish plaintiff's claim.

Although there was no evidence that Mrs. Hernandez saw or would likely have seen the small, clear puddle of slippery bubble bath without closely inspecting the floor, the jury held her to have been 25% responsible for the accident and her resulting injuries. Such a finding imputed to her knowledge of the existence of a hazard that she should have discovered, which is clearly contrary to Louisiana law. Plaintiffs sought to offer evidence from a safety expert that such a condition of the store was unlikely to be discovered by a customer without that person undertaking an "inspection" for that purpose. The Trial Court excluded such testimony. Accordingly, plaintiffs raised that issue in their post-verdict motion. The Trial Court denied it, basing its opinion upon its conclusion that plaintiff's contributory negligence could have been found from the admitted evidence.

Mr. and Mrs. Hernandez testified about the frequency of their sexual relations before the accident and the effect upon that aspect of their marriage that was caused by Mrs. Hernandez's pain from the injuries she sustained in the slip at K-Mart. That evidence was uncontradicted. No factual basis was recited as a potential basis for the jury's determination that Mr. Hernandez was unentitled to compensation for his loss of consortium resulting from his wife's injuries at K-Mart. The judges of the Court of Appeals, apparently drawing upon their own experiences concerning frequency of marital relations, considered that the jury could have found the uncontradicted testimony of the plaintiffs to be incredible. Mr. Hernandez testified that he and Mrs. Hernandez had sexual intercourse daily, sometimes as often as twice daily. The Court said: "Given the frequency of pre-accident sexual relations alleged by Hernandez, the jury rightly could view his claim with

some skepticism." (Appendix A, p. A7-A8, *post.*) The Court below thus affirmed the jury's denial of Mr. Hernandez's claim for loss of consortium in the face of uncontradicted evidence of such loss--a result that clearly could not have happened under Louisiana law.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction over these proceedings was asserted by the defendants who filed a notice of removal and removed this case from the Thirty-Fourth Judicial District Court for the Parish of St. Bernard, State of Louisiana, to the United States District Court for the Eastern District of Louisiana. Petitioners sought to amend their original petition to add non-diverse parties against whom they had viable State law claims. The district court denied petitioners' motion for leave to amend their petition and to remand these proceedings to the State court from which this suit was removed. The Court did not rule on petitioners' motion to remand

based upon the absence of the required amount in controversy. The jury awarded damages to the petitioner, Toni D. Hernandez, in the following amounts:

A.	Pain and suffering	$10,000.00
B.	Past medical expenses	$20,916.58
C.	Future medical expenses	$ -0-
D.	Past loss of earnings	$ 1,000.00
E.	Loss of future earning capacity	$ -0-

That award amounted to $31,916.58. The jury, however, found Mrs. Hernandez to be comparatively negligent and assigned 25% of the fault for her injuries, damages and losses to her own negligence. The district court accordingly reduced the award to Mrs. Hernandez to $23,936.45. The jury determined that Mr. Hernandez was not entitled to any remuneration for his loss of consortium with his wife as a result of the injuries the jury found to have been proven to be causally related to Mrs. Hernandez's slip at the K-Mart store.

There is a legitimate issue whether the federal courts had jurisdiction over these proceedings upon removal of this case from the State courts. Jurisdiction was asserted and exercised by the federal courts pursuant to the removal statutes, 28 U.S.C. §1441 *et seq.*, and the federal jurisdictional statute concerning the diversity of citizenship among the parties, 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully assert that there were numerous errors in these proceedings which have produced a result which is inconsistent with Louisiana substantive law governing cases of this type. This petition asserts as grounds for the exercise of this Court's extraordinary power of supervision over the lower courts only those issues we believe to merit this Court's attention. The issues presented are (1) whether the trial court abused its discretion and denied petitioners' right

to sue a proper party defendant whose citizenship would have destroyed the subject matter jurisdiction of the federal court when it refused leave to amend the petition to add such a defendant and require a remand of this removed case; (2) whether the federal trial court, in this diversity of citizenship jurisdictional case, improperly denied plaintiffs the benefit of substantive Louisiana precedent when it refused to instruct the jury upon the sufficiency of proof of causation of damages under Louisiana law, thus affecting the outcome of this trial by denying the jury guidance which would have reduced the likelihood of compromise by the jurors upon either the issue of quantum of damages or victim fault; (3) whether the trial court erred in excluding relevant expert opinion testimony which would have provided the jury with information which would have avoided a determination of partial fault of the victim; and (4) whether the trial court erred in denying Mr. Hernandez's motion for a new trial

on his claim for loss of consortium when the uncontradicted evidence permitted no conclusion other than that he had sustained such a loss.

(1) **Refusal to permit diversity-destroying amendment and remand to State court**

Plaintiffs had a right to sue in the forum of their choice, *viz.*, the Louisiana courts in which errant jury verdicts are corrected by the appellate courts under their power to review questions of law or fact. *See* Art. 5, §§5(C), 10(B), La.Const.1974. That appellate power leads to greater uniformity in the application of Louisiana law, and it also leads to greater predictability of the outcome when determining in which forum one should sue. The Seventh Amendment to the United States Constitution prevents federal appellate courts from undertaking such extensive review of jury verdicts. Thus, the petitioners' choice of the Louisiana forum was the exercise of a substantial right. *Accord International Primate Protection League v. Administrators of Tulane*

Educational Fund, 500 U.S. ____, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134, 143 (1991).

Before this case was removed to federal court, Louisiana law was not clear that a store manager could be held personally liable for unreasonably dangerous conditions upon premises of his employer under the new slip and fall law, La.R.S. 9:2800.6. In 1988, the Louisiana legislature promulgated a statute which governed slip and fall litigation upon merchants premises, providing:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a suit for damages by a person who has suffered damages as a result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.

C. In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or clean-up of the area where the accident giving rise to the damages occurred.

D. "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. (Added by Acts 1988, No. 714, §1)

In the appellate court, respondent argues that no "personal" duty was owed by the employees to store patrons since La.R.S. 9:2800.6 imposed that duty only upon the merchant. Respondent argued (Appellee's Brief, p. 18):

> In addition to defining the duty owed to the premises user, this statute also provides for the burden of proof and evidentiary requirements in suits filed by customers. The duty to customers is owed only by the merchant, which in this case is Kmart. Although reference is made to employees of the merchant with respect to evidentiary requirements, nothing in the statute creates a personal duty on the part of the merchant's employees. Furthermore, defendant submits that the fact that the responsibilities of the employees are discussed only with respect to

> the evidentiary burdens of the merchant infers a specific intention on the part of the legislature not to create a personal duty on behalf of employees.

Plaintiffs had informed the district judge, when they sought to amend their suit to add the store manager as a defendant whose presence would destroy diversity of citizenship between the plaintiffs and defendants, that the Louisiana courts had only recently clarified Louisiana law to establish that a store manager may be held liable for a premises hazard under La.R.S. 9:2800.6. *See Holmes v. Great Atlantic & Pac. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. 1991), writ den., 592 So.2d 412 (La.1992). On appeal, the Court below wrote (Appendix A, p. A-3, *post*):

> Hernandez seeks to justify her delay in seeking the amendment by claiming that a Louisiana appellate decision clarified the law in this area, allowing her to sue the manager. *See Holmes v. Great Atlantic & Pac. Tea Co., [supra].* We find this claim puzzling, as that decision states that the law on this point has been settled since 1973. *See id.* at 752.

That position was not puzzling to Louisiana practitioners, many of whom had construed Louisiana law in the same manner as had plaintiffs' counsel, including the defense counsel who continued to press that argument before the Fifth Circuit despite the contrary holding of the Louisiana Court of Appeal in *Holmes*. The respondents' argument in the Court below was almost identical to the rejected position of the merchant in *Holmes* (587 So.2d at 752):

> Bolling asserts that La.R.S. 9:2800.6(A) statutorily provides that the *exclusive* duty owed to a customer injured on the merchant's premises is owed by the merchant and not by the merchant's employees. Bolling contends that since the responsibilities of the employees are discussed only with respect to the evidentiary burden of the merchant, this infers a specific intention on the part of the legislature not to create a personal duty on the part of employees.
>
> This interpretation of R.S. 9:2800.6 is unfounded. Although Section A defines the duty owed by the merchant, the language of the statute in no way creates an *exclusive* remedy that preempts claims against the merchant's employees who may also be at fault.

The 1973 case to which the Fifth Circuit referred is *Canter v. Koehring Co.*, 283 So.2d 716 (La.1973), which

"specifically approve[d]," 283 So.2d at 722, a line of cases which established the following criteria for imposing individual liability upon an employee when the employer owed a duty to the injured person (283 So.2d at 721):

> 1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.
>
> 2. This duty is delegated by the principal or employer to the defendant.
>
> 3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances -- whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.
>
> 4, With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent, or employee simply because of his general administrative responsibility for performance of some function of the

employment. **He must have a personal duty towards the injured plaintiff,** breach of which specifically has caused the plaintiff's damages. **If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility,** unless he personally knows or personally should know of its non-performance or malperformance and has nevertheless failed to cure the risk of harm. (Emphasis added)

Based upon the view that §2800.6 imposed a duty upon the merchant but not the employees who did not cause the hazard, many federal courts in Louisiana have generally treated claims against store managers as a fraudulent joinder. *See, e.g., Elder v. Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D.La.1990); *Freeman v. Wal-Mart Stores, Inc.*, 775 F.Supp. 208, 209 n. 1 (W.D.La. 1991), to mention only the reported cases. There were also a number of unreported cases to the same effect. Under that interpretation of §2800.6, which the respondent continued to urge after the opposite holding was made by the Louisiana courts in *Holmes*, naming the

store manager (if his identity had even been known then) would have been met with a claim of fraudulent joinder. It was only after *Holmes* was decided and the Louisiana Supreme Court denied a petition for a writ of review that the liability of a store manager for violation of the duties imposed by La.R.S. 9:2800.6 upon his employer became clear and that the holding of *Canter v. Koehring Co., supra,* applied in a case brought under La.R.S. 9:2800.6. It was only then that plaintiffs were justified in seeking to amend their suit to make the non-diverse store manager a party defendant. Before trial they sought to do so but were denied that opportunity by the district court.[5]

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[5]Significantly, removal of a case from the State courts may be undertaken even during the trial, except in a criminal case, when the grounds for removal first become known at that stage of the proceedings. Consequently, it would be anomalous to deny a plaintiff an opportunity to amend his pleadings to require remand at that stage of the proceedings when discovery of the grounds for amendment and remand come to light only after the cutoff date imposed by the Court for amending the pleadings.

Although Rule 15(a), F.R.C.P., mandates that leave to amend a complaint "be freely given when justice so requires," this Court's holding in *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), has led to the understanding that "the grant or denial of an opportunity to amend is within the discretion of the District Court." In 1988, Congress provided in 28 U.S.C. §1447(e) for discretion on the part of federal district courts in removed cases to permit amendment of a suit to destroy diversity. In such cases where amendment was permitted, Congress required that a removed case be remanded to the State courts for further proceedings. 28 U.S.C. §1447(c, e). That required a departure from the long line of cases, typified by *Barney v. Latham,* 103 U.S. 205, 26 L.Ed. 514 (1881), which hold that removability and entitlement to a remand of removed proceedings are determined by the state of the pleadings at the time of removal. Once there was no longer complete

diversity between the plaintiffs and defendants, federal subject matter jurisdiction would have been lost.

In *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5 Cir. 1987), *cert. den.*, 493 U.S. 851, 110 S.Ct. 150, 107 L.ed.2d 108 (1989), the Court held that it was not necessary that a party be indispensable before a diversity-destroying amendment may be allowed to cause remand of removed proceedings to State court. That Court held that proper parties may be brought in by amendment, even though the federal courts thereby lose jurisdiction over the controversy. The Court established certain criteria for the exercise by a district judge of the discretion to determine whether to permit such an amendment. Those criteria are (833 F.2d at 1182):

> the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.

We respectfully submit that the *Hensgens* factor inquiring into the motive to defeat federal diversity jurisdiction is improper and inconsistent with this Court's holdings upon the related issue of fraudulent joinder which would prohibit removal in the first instance. The joinder of a resident defendant for the purpose of defeating removal jurisdiction is not improper where, by the settled law of the state in which the action is brought, the resident defendant is solidarily liable with the non-resident defendant(s). *Chicago, B. & Q. R. Co. v. Willard,* 220 U.S. 413, 31 S.Ct. 460, 55 L.Ed. 521 (1911); *Chicago, R.I. & P.R. Co. v. Schwyhart,* 227 U.S. 184, 33 S.Ct. 250, 57 L.Ed. 473 (1912); *Chicago, R.I. & P.R. Co. v. Whiteaker,* 239 U.S. 421, 36 S.Ct. 152, 60 L.Ed. 360 (1915). Thus, although it might have been petitioners' intention to provoke a remand by the joinder of the resident store manager, we submit that it was improper for that motivation to have been considered to

be grounds for denying his motion for leave to amend his pleadings and to remand this cause to the State courts from which it had been removed. As shown in the district court, *Holmes* was not decided until after the amendment cutoff date, hence it is contrary to justice to bar petitioners from amending their complaint on that basis. Petitioners were significantly injured in the deprivation of their choice of forum with its attendant benefit of appellate review of the facts and a predictable legal result. Since amendment must be freely allowed when it was in the interest of justice to permit it, and since the refusal to allow petitioner to amend and destroy the diversity jurisdiction of the trial court deprived petitioners of viable claims against the resident defendant store manager which were then countenanced under Louisiana law as construed in *Holmes*, the second *Hensgens* factor was clearly satisfied. The Trial Court abused its discretion when it refused to permit the

amendment of this suit which would have returned this case to the plaintiff's chosen forum.

This Court has never decided, especially since the 1988 amendments to 28 U.S.C. §1447, under what circumstances a diversity-destroying amendment should be permitted. The *Hensgens* test, which imposes conditions which are contrary to a plaintiff's rights with regard to the issue of removability in the first instance, should not be regarded as a proper test of when such an amendment should be allowed. This case presents a recurring issue which will plague federal litigation until it is resolved by this Honorable Court. This is thus a proper case in which to grant review upon a writ of certiorari. Rule 10.1(a, c), Supreme Court Rules.

2) **Refusal to instruct in accordance with Louisiana law**

Federal courts sitting in a case arising under diversity of citizenship jurisdiction or removal jurisdiction predicated upon the diversity of citizenship of the parties are

bound to follow the substantive law of the State in which the claim arose. *Hanna v. Plumer,* 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). In determining whether an issue is controlled by State law, the inquiry is: "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" *Hanna v. Plumer, supra,* 380 U.S. at 466, quoting *Guaranty Trust Co. v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945).

In this case, the Court refused to instruct the jury, in accordance with *Housley v. Cerise,* 579 So.2d 973 (La.1991), that establishment of the issue of causation could be based upon proof of plaintiff's previously asymptomatic pre-existing condition, symptom onset immediately following the incident for which reparation is sought, and medical evidence that it was "reasonably

possible" for that mechanism of injury to have produced that result. Without such an instruction defining the burden of proof upon that issue, the jury was left to apply the ordinary preponderance of evidence standard without the benefit of this principle which relaxed the burden in the above described scenario. The jury held that K-Mart was liable for all of the plaintiff's injuries, damages and losses, but it awarded the plaintiff a pittance for the injuries she actually sustained. She had suffered for several months with a lumbar sprain. She had required substantial orthopedic surgery to relieve the symptoms precipitated by the slip at the defendant's store which activated a previously asymptomatic condition. That surgery entailed not only a procedure in the site of the injury but another to remove a segment of bone to use as a bone graft in the area of the primary surgery. For all of that, the jury awarded only $10,000 in general damages.

The refusal to properly instruct the jury in accordance with Louisiana decisions significantly affected the result of this case, not on the issue of liability but the issue of quantum. The only reasonable explanation for the low award made by the jury in this case, especially when compared with comparable cases in State court, was that the jury compromised on the issue of damages in order to reach a consensus on the issue of liability. The trial court denied petitioners' right to a fair trial when it refused to properly instruct the jury. The Court below thus sanctioned an impermissible departure from controlling law which calls for this Court's intervention and correction to produce a just result. Such a basis for the exercise of this Court's jurisdiction is found in Rule 10.1(a), Supreme Court Rules.

3) **Exclusion of Relevant Expert Opinion**

This is a slip and fall case involving a clear, viscous substance spilled upon a mottled green tile floor.

Plaintiffs sought to call a safety expert and a physicist to establish the unreasonably dangerous nature of the condition which caused Mrs. Hernandez to slip and twist her ankle and back. The defendants, at a pre-trial conference, informed the Court that it intended to file a motion *in limine* to suppress that expert testimony. The trial court subsequently ruled that plaintiffs' expert witnesses' testimony was inadmissible because the subject upon which they would testify was obviously correct. The safety experts were proffered to testify regarding a number of things: the dangerousness of such a condition, the unlikelihood a customer would have seen and avoided the hazard while shopping, the attractiveness to children of the packaging of the product, the placement of the product within reach of small children, and the ease with which such children could open the bottles and spill their contents upon the tile floor, thus creating a high risk of the hazard encountered

by Mrs. Hernandez. The physicist was proffered to testify regarding the scientific principles relative to slipperiness of the substance and its hazardous nature in combination with the coefficient of friction of the tile floor on which the viscous substance was deposited. That testimony had a tendency to make the existence of some facts, and the non-existence of some others, that were of consequence to the determination of the store's fault and the absence of fault of the victim more probable or less probable, respectively, than could be shown without the evidence. Rule 401, F.R.Evid. Thus, the evidence was "relevant." *Ibid.*

The evidence tended to show that the presence of the liquid on the floor presented an unreasonably dangerous hazard which should not have been permitted to remain undiscovered in a merchant's store, especially in the area where there were numerous products of that nature placed on shelves for sale to customers, any one

or more of which could have been defective and leaking or opened by a customer and leaking upon the floor. Such expert evidence also tended to show that a shopper would not have been comparatively negligent if her activities diverted her attention from the floor and the substance was not an obvious hazard. As previously noted, the federal courts sitting in diversity must apply Louisiana law. In the instant case, the Fifth Circuit clearly failed to do so when it failed to follow the Louisiana Supreme Court's decision in *Perez v. Wal-Mart Stores, Inc.*, 608 So.2d 1006 (La.1992), which held that a store customer should not be held liable for any comparative fault at all unless there is some kind of large or *clearly visible* obstruction or spill on the floor of the store. As the evidence showed in this case, there was no such spill. The bubble bath was a clear liquid upon a green tile floor which was difficult to see in the absence of an inspection for such substances. It is clear

under Louisiana law that a customer of a store does not have to undertake such an inspection in order to avoid being held contributorily negligent. *See, e.g., Peralta v. Schwegmann Bros. Giant Supermarkets, Inc.*, 406 So.2d 720 (La.App. 4 Cir. 1981), *writ den.*, 410 So.2d 762 (La.1982). Moreover, Louisiana courts have consistently held that a store customer had no fault in failing to see a clear liquid on a store floor. *See, e.g., Bergeron v. K-Mart Corp.*, 540 So.2d 406 (La.App. 1 Cir. 1989); *Cash v. Charter Marketing Co.*, 607 So.2d 1036 (La.App. 3 Cir. 1992); *Bonnette v. K-Mart, Inc.*, 502 So.2d 202 (La.App. 3 Cir. 1987).

The Court excluded the evidence on the basis that the conclusions were obvious and did not require scientific evidence. That the testimony went to an ultimate conclusion of fact may not be a basis for excluding the evidence. Rule 704, F.R.Evid.

This Court, in the recent case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), set forth guidelines for determining when expert testimony is admissible under Rule 702, F.R.Evid. In that case this Court held that (113 S.Ct. at 2797):

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

The trial court in this case focused upon the conclusions, rather than the principles and methodology, and excluded relevant evidence that would have assisted the trier of fact in its determination of the issue of Mrs. Hernandez's contributory negligence. Such evidence is offered routinely in cases tried in Louisiana courts. Louisiana has adopted a Code of Evidence which substantially follows the Federal Rules of Evidence.

This Court, in *Daubert, supra,* 113 S.Ct. at 2798, held that exclusion of relevant evidence was inappropriate. This Court indicated that the method of dealing with such evidence was, instead (*ibid.*):

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *See Rock v. Arkansas,* 483 U.S. 44, 61, 107 S.Ct. 2704, 97 L. Ed.2d 37 (1987).

The decisions of the courts below are inconsistent with this Court's holding in *Daubert.* Therefore, this is an appropriate case for summary reversal and remand for a new trial. *See* Rule 10.1(c), Supreme Court Rules.

(4) **Denial of loss of consortium claim**

Under Louisiana law, there are several components to a claim for loss of consortium: (1) loss of love and affection, (2) society and companionship, (3) sexual relations, (4) the right of performance of marital services, (5) the right of support from a spouse, (6) aid and assistance, and (7) loss of felicity. *Warner v. Great*

Atlantic & Pac. Tea Co., 583 So.2d 61, 65 (La.App. 2 Cir. 1991). Proof of any of these elements is sufficient for an award of loss of consortium. *Ibid.; Finley v. Bass*, 478 So.2d 608 (La.App. 2 Cir. 1985). In the instant case, the jury made no award for Mr. Hernandez's loss of consortium, even though he established several of the elements stated above and his and his wife's testimony was not contradicted by the defendants. The Court of Appeals, upon review of this issue, appeared to conclude that the plaintiff's testimony concerning the frequency of sexual relations before his wife's injury somehow made the entirety of his testimony suspect. The evidence which was offered at trial on this issue did not suggest otherwise than that Mrs. Hernandez sustained an injury (the jury compensated her for it) and that her injury was painful and caused her to miss work (the jury compensated her for both of those). Under Louisiana law, there was no basis for refusing to award Mr.

Hernandez a reasonable amount as compensation for his losses attributable to the proven injury of his wife.

No reasonable jury could have concluded that the plaintiff did not prove his claim for loss of consortium under Louisiana law. Thus, the refusal to grant plaintiff either a new trial or to render a judgment *non obstante veredicto* in his favor on the issue of liability and order a new trial on the issue of damages was an abuse of discretion which denied plaintiff a fair trial.

No decision of this Court has decided when a federal court must step in to prevent a miscarriage of justice such as this one when the uncontradicted evidence clearly establishes a party's claim and there is no competent evidence to refute it. Therefore, this is also an appropriate case in which this Court should exercise its supervisory jurisdiction. Rule 10.1(a), Supreme Court Rules.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari and review the judgment and opinion of the Court below, following which it should vacate the judgments below and remand this cause for a new trial on the issue of damages and the comparative fault of the plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the foregoing to be served upon opposing counsel, by United States Mail, first class postage prepaid, by mailing a copy thereof to Rodney A. Seydel, *Esq.*, Attorney for K-Mart Corporation, at the following address this 23rd day of September, 1993:

Rodney A. Seydel, *Esq.*
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650 Poydras Street
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Tel.: [504] 523-1385

JOHN E. RUIZ, JR.
Attorney at Law

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3478

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

K-MART CORPORATION, *et al.*,

Respondent

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-90-2180 "I")

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

This slip and fall case arose on July 26, 1989, when Toni Hernandez slipped in a small puddle of bubble bath or shampoo in a Chalmette, Louisiana K-Mart store. Hernandez' husband caught her before she fell, but the slip injured her back and aggravated a dormant cyst in her ankle. After a three-day trial, the jury awarded damages of $31,916.58. After reviewing the briefs and record, we conclude that no error occurred and affirm the judgment.

I.

The district court established August 2, 1991, as the deadline for amending the complaint. On December 30, 1991, eight days before trial, Hernandez sought to

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

join the K-mart manager as an additional defendant -- a joinder that would have destroyed diversity of citizenship and deprived the district court of jurisdiction. We review the district court's denial of Hernandez's motion for abuse of discretion. *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5 Cir. Unit A Nov. 1981).

The district court did not abuse its discretion. Hernandez seeks to justify her delay in seeking the amendment by claiming that a Louisiana appellate decision clarified the law in this area, allowing her to sue the manager. *See Holmes v. Great Atlantic & Pac. Tea Co.*, 587 So.2d 750 (La.App. 4 Cir. 1991), *writ den.*, 592 So.2d 412 (La.1992). We find this claim puzzling, as that decision states that the law on this point has been settled since 1973. *See id.* at 752.

Simply because a court had held that joinder was improper in another case involving this K-Mart, does not mean that the law was confused. Rather, the court in

the other case applied the settled law and concluded that no liability could be imposed under that standard. Even if the law were incorrectly applied in that other case, Hernandez had no excuse for not attempting to join the manager earlier.

II.

Next, Hernandez argues that the district court erred by failing to grant her motion for judgment as a matter or law or for a new trial on the ground that the evidence does not support a finding of comparative negligence. The jury found Hernandez twenty-five percent at fault. We must affirm the verdict unless the evidence points so overwhelmingly in favor of one party that a reasonable jury could not have arrived at the verdict. *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5 Cir. 1969) (*en banc*).

Hernandez calls our attention to *Doming v. K-Mart Corp.*, 540 So.2d 400, 405 (La.App. 1 Cir. 1989),

affirming the trial court's granting of a judgment notwithstanding the verdict on the issue of comparative negligence. The trial court reduced the jury finding of forty percent negligence to five percent. Here, however, the record presents adequate evidence to support the verdict. Hernandez had shopped at this store many times and was familiar with the store's layout. She testified that at the time of the accident, she was looking straight ahead, rather than down, and was not looking at displays or merchandise. A reasonable jury could find negligence from these facts.[1]

III.

Hernandez also argues that the jury verdict undercompensated her for pain and suffering and

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[1] We reject Hernandez's argument that the district court abused its discretion in excluding the testimony of her safety experts. The testimony offered by the experts related to matters within the common knowledge of typical people, thereby obviating the need for expert analysis. *Peters v. Five Star Marine Serv.*, 598 F.2d 448, 449 (5 Cir. 1990) (*per curiam*).

disregarded evidence of her loss of earnings. We will not disturb a jury finding on damages unless it is entirely disproportionate to the injury sustained. *Calderera v. Eastern Airlines*, 705 F.2d 778, 784 (5 Cir. 1983). We do not believe that the award for pain and suffering was so disproportionate as to justify a new trial, as the award was approximately half as large as the damages for medical expenses. This award is especially justified, as Hernandez admitted on cross-examination that she had reinjured her ankle when she fell off of her crutches. Given that she had previously denied this injury, the jury had reason to question her veracity.

Likewise, we cannot conclude that the jury's award for loss of earnings was unreasonable. Hernandez worked for her mother's accounting firm and testified that she had missed thirty-nine weeks of work because of the accident. Hernandez's mother testified, without documentation, that just prior to the accident she had

decided to increase Hernandez's workload and responsibilities substantially. We think a reasonable jury could view this testimony with some skepticism. As a result, we cannot disturb the jury's findings.

IV.

Finally, Hernandez asserts that the jury erred by failing to award damages for loss of consortium.[2] Hernandez's husband testified that he had sexual relations with his wife once or twice per day, every day before the accident, and that this dwindled to about once per month after the accident. He testified that Hernandez was bedridden for four months, yet she never told her doctor. Given the frequency of pre-accident sexual relations alleged by Hernandez, the jury rightly could

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[2] K-Mart Corporation argues that we do not have jurisdiction over the loss of consortium claim because Hernandez's husband is not listed as a party on the notice of appeal. Although the notice of appeal uses the phrase "*et al.*," we previously have held that "*et al.*" suffices to provide notice where there are only two parties. *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 85 (5 Cir. 1990).

view his claim with some skepticism. When combined with the overall questionable nature of testimony on other issues, the jury reasonably could choose not to believe Mr. Hernandez's testimony.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
JANUARY 3, 1992
MENTZ, J.

TONI DECOSSAS HERNANDEZ, ET AL CIVIL ACTION

VERSUS NO. 90-2180

KMART CORPORATION SECTION "I" (1)

Before the court is the plaintiff Toni Hernandez's Motion to Amend Complaint and to Remand to State Court. After reviewing the motion, memoranda of counsel, the record, and the law, the court denies the motion.

The plaintiff seeks to amend the complaint and add two non-diverse defendants, and to have the case remanded to state court. In determining whether to allow the amendment, the court must carefully balance the equities. *Hensgens v. Deere & Co.*, 833 F.2d 1179,

1182 (5 Cir. 1987). In this case, the court finds that the equities weigh in favor of denying the amendment.

First, the court notes that the deadline for amendments to the complaint was August 2, 1991. Plaintiff asserts that she recently discovered the state court decision, *Holmes v. Great Atlantic & Pacific Tea Co.*, 587 So.2d 750 (4 Cir. 1991), which provides for a cause of action against the store manager. However, this recent case does not explain the plaintiff's failure to join K-Mart #3387, a Louisiana corporation, as a defendant. The plaintiff asserts that she is still attempting to find out the extent to which K-Mart #3387 is involved in the subject K-Mart store. The time for discovery has already ceased, and there is no excuse for failing to join this non-diverse defendant prior to the eve of trial.

Second, that this case has already been continued twice upon motion of the plaintiff. At the pre-trial conference, the plaintiff indicated that she might file a

motion to remand based upon the jurisdictional amount. The court indicated that it did not think such a motion would be successful, but that the court would consider such a motion if the parties could present appropriate authority therefor. Instead, the plaintiff has filed a motion to remand on different grounds. The court finds that the interests of justice require that this case proceed to trial.

The court does not find that the plaintiff will be *significantly* injured by denial of the amendment. While it will deprive the plaintiff of a possible claim against the store manager, the plaintiff still has a claim against the K-Mart Corporation. When weighed against the prejudice to the defendants of yet another delay, the court finds that amendment is unwarranted.

Finally, the plaintiff has not provided the court with an amended complaint which would allow removal. The amended complaint attached to plaintiff's motion has a

state court caption, thus the plaintiff has not even presented an amended complaint which applies to this action.

The plaintiff has had ample opportunity to amend the complaint, and the court finds that it would be inappropriate to amend the complaint and remand the case on the eve of trial. The court denies the motion.

Accordingly,

IT IS ORDERED that the plaintiff Toni Hernandez's Motion to Amend Complaint and to Remand to State Court is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TONI DECOSSAS HERNANDEZ, ET AL CIVIL ACTION

VERSUS NO. 90-2180

KMART CORPORATION SECTION "I" (1)

ORDER AND REASONS

Mentz, J.

Before the Court is the Motion for Judgment as a Matter of Law, or for Judgment Notwithstanding the Verdict, or Alternatively for a New Trial, filed by the plaintiffs, Toni Decossas Hernandez and Sherman Hernandez. Finding that the jury verdict and judgment in this matter are well-supported by the evidence and the law, the Court DENIES the motion.

The plaintiffs' claims arise from injuries sustained by Toni Hernandez when she slipped on some Sesame Street Bubble Bath which was on the floor at the K-Mart

store in Chalmette, Louisiana. This matter was tried in January, 1992, and the jury returned a verdict in favor of the plaintiffs. Damages were awarded of $20,916.58 for past medicals, $10,000 pain and suffering, $1,000 past wage loss, and no damages for future medicals, future loss of wages, or Sherman Hernandez's loss of consortium. In addition, the jury assigned 25% contributory negligence to the plaintiff, Toni Hernandez.

The plaintiffs complain that a number of this Court's evidentiary rulings, and some allegedly inflammatory remarks by defense counsel, caused the jury to improperly assess contributory negligence against the plaintiff, Toni Hernandez, and to award low amounts in damages. The plaintiffs ask this Court either to grant judgment as a matter of law reversing the jury's determination that Toni was contributorily negligent, or to grant a new trial. The Court notes that many of plaintiffs' complaints contained in this motion cannot be remedied

by this Court with a judgment as a matter of law. The Court cannot assess particular amounts of damages or percentages of fault, as these are findings of *fact* not matters of *law*.

Rule 50(a) of the Federal Rules of Civil Procedure provides:

> (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim * * * which cannot under the controlling law be maintained without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before the submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Pursuant to Rule 50(b), a party who has made a motion for judgment as a matter of law which was not granted may renew such motion by filing and service not later than ten days after the entry of the judgment.

The plaintiffs' argument regarding the jury's finding of contributory negligence appears to be that if the plaintiffs had been allowed to present their safety experts and rebuttal witness regarding K-Mart's liability, the jury would have come to a different conclusion. The crux of this argument is not that *based upon the evidence presented at trial* the plaintiffs are legally entitled to a judgment that Toni Hernandez was not contributorily negligent, but that, *if other evidence was presented at trial,* the jury would have found that Toni Hernandez was not contributorily negligent. The plaintiffs' burden under Rule 50(a)(1), however, is to demonstrate that there is "no legally sufficient evidentiary basis" for a reasonable jury to find that Toni Hernandez was contributorily negligent." This the plaintiffs have not done; they have relied upon "facts" which were excluded from evidence rather than the facts in evidence. The Court finds that the jury's verdict that Toni Hernandez was 25% contribu-

torily negligent was supported by the evidence at trial. A Motion for Judgment as a Matter of Law is an inappropriate vehicle for challenging a Court's evidentiary rulings.

The plaintiffs have moved in the alternative for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A new trial may be granted under Rule 59 if "the verdict is against the great weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5 Cir. 1985) (footnotes omitted). The plaintiffs' argument in favor of the motion for new trial is that a number of the Court's rulings either rendered the proceedings unfair, or amounted to prejudicial error.

The plaintiffs complain of the following: (1) the Court's order prohibiting the testimony of plaintiffs' safety experts; (2) the Court's order prohibiting plaintiffs' expert,

Wilfred Gallardo, from testifying under Rule 406 of the Federal Rules of Evidence regarding his observations of unclean conditions at the K-Mart store on dates other than the date of the accident; (3) the Court's order prohibiting Teddy Lenaris from testifying as a rebuttal witness; (4) the defendant's failure to produce a sample floor tile, as per the Court's order of December 20, 1991; (5) defense counsel's allegedly inflammatory remarks during closing arguments on various other subjects, including Toni Hernandez's truthfulness about subsequent injuries, the extent of her loss of future earnings, and the loss of consortium claim; and (6) the Court's failure to give plaintiff's requested jury instruction regarding medical causation. The Court finds that none of these asserted "errors" rendered the proceedings unfair, or constituted prejudicial error.

First, the Court order prohibiting the testimony of plaintiff's safety experts was proper. This case involved

a slip on bubble bath; the jury needed no expert testimony in order to understand that bubble bath is slippery.[1] Expert testimony was also not necessary to help the jury understand that a clear liquid might be difficult to see given the color of the tile.[2] Finally, expert testimony is not necessary for the jury to understand and evaluate the clean-up procedures in place at the store. The plaintiffs further allege that the defendant's motion in limine should not have been granted because the defendants did not list it as a contemplated motion in the Pre-Trial Order. The Court's Minute Entry following the Pre-Trial Conference, however, indicates that the

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[1] The plaintiff's argument that an expert was necessary to explain to the jury that the tile surface had a low "coefficient of friction" is without merit; there was no dispute that the bubble bath on the floor caused the slip.

[2] The plaintiffs also complain of the defendant's failure to provide the plaintiffs with a sample tile. The Court finds that the failure to produce the tile did not amount to prejudicial error. The plaintiff produced photographs which demonstrated the color of the tile. The Court also notes that the plaintiffs did not at any time prior to trial attempt to compel production of the tile.

defendant informed the Court at the conference of its intent to file a motion to strike plaintiffs' expert's [*sic*].[3] Therefore, the plaintiffs' argument that the motion was untimely is wholly without merit.

Having been denied the opportunity to present the testimony of their experts, the plaintiffs sought to have their expert, Wilfred Gallardo, testify regarding his personal observations of conditions at the K-Mart. The plaintiffs sought such testimony pursuant to Rule 406 of the Federal Rules of Evidence as evidence of K-Mart's habit of failing to clean spills. Gallardo did not observe conditions in the store on the day of the accident, therefore the only relevance of his proposed testimony would have to be on the issue of habit. However, Gallardo's visits to the store were not sufficiently frequent as to be reliable evidence of habit, therefore, the

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[3] "The defendant contemplates filing a motion to strike plaintiff's expert witnesses. Such motion should be filed not later than December 30, 1991 at 5:00 p.m." *See* Minute Entry, December 23, 1991.

evidence was properly excluded.

The plaintiffs' complaint regarding the Court's refusal to allow Teddy Lenaris from testifying as a rebuttal witness is also without merit. The plaintiffs sought to use Lenaris as a rebuttal witness to testify that K-Mart employees did not actually follow the clean-up and safety practices which they testified to. Lenaris was not listed as a witness in the Pre-Trial Order. The Court's standard scheduling order requires that parties list all witnesses, except "rebuttal witnesses . . . when necessity cannot be reasonably be [*sic*] anticipated" for their use. Attorney's [*sic*] should be careful in failing to list a witness who is really part of their case-in-chief. *See Morgan v. Commercial Union*, 606 F.2d 554 (5 Cir. 1979). The Court disallowed Lenaris' testimony because he was really part of plaintiffs' case-in-chief. In addition, the Court does not agree with plaintiffs' argument that his use could not be reasonably anticipated. The

plaintiffs assert that the testimony of the K-Mart employees far exceeded their deposition testimony with respect to clean-up practices at the store. The Court notes, for example, that Brenda Doucet testified in her deposition regarding clean-up training and practices numerous times. *See* Plaintiffs' Memorandum in Support, Ex. B, pp. 12, 18, 20, 35-36, 41. Where the issue at trial was the reasonableness of K-Mart's clean-up practices, the plaintiffs would have been remiss if they had not anticipated that the store employees would testify that they were always on the look out for unsafe conditions.

The Court also notes that the testimony of the expert witnesses and Lenaris would have been relevant only to the issue of K-Mart's liability, an issue which the jury determined in the plaintiffs' favor. The plaintiffs go on to argue that because this evidence was not presented regarding liability, the jury rendered a verdict on damages which was too low. The plaintiffs here confuse

the issues of liability and damages. The burden is on the plaintiffs to prove the amount of their damages caused by the accident.[4] Once the jury determined that K-Mart was liable for the accident, the issue of damages is a separate inquiry. The plaintiffs have not pointed out in this motion, any specific evidence, which was presented to the jury, which would warrant a larger award for damages.

As to plaintiffs' complaints regarding allegedly inflammatory statements made in closing arguments, the Court points out that such statements were just that --

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[4] The plaintiffs also argue that because the Court did not give their requested instruction on medical causation, *see Housley v. Cerise*, 579 So.2d 973 (La. 1991), the jury award for pain and suffering was too low, and the jury failed to award damages for future medicals. The plaintiffs do not cite, however, what evidence would have supported an award of future medicals. The Court finds that from the evidence presented at trial, the jury could easily concluded [*sic*] that Toni Hernandez would incur no future medical expenses as a result of her accident at K-Mart. The damage awards in this case result, not from improper rulings by the Court, but from a failure of the plaintiffs to present sufficient evidence to warrant a greater award.

argument. The Court properly instructed the jury that statements made by counsel are not evidence, and that the jury is free to disregard the arguments of counsel. It is certainly proper for counsel, during argument, to point out any inconsistencies in the testimony. The Court does not find that any of the alleged statements in the closing arguments was [*sic*] unduly prejudicial.

For the foregoing reasons, the Court finds that a new trial in this matter is unwarranted.

Accordingly,

IT IS ORDERED that

(1) the Motion for Judgment as a Matter of Law, or for Judgment Notwithstanding the Verdict, or Alternatively for a New Trial filed by plaintiffs Toni Decossas Hernandez and Sherman Hernandez is DENIED; and

(2) the hearing on the motion set for April 22, 1992 is CANCELED.

[Dated and signed by the Trial Judge on 4/13/92].

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3478

TONI DECOSSAF HERNANDEZ,

Petitioner

versus

K-MART CORPORATION, *et al.*,

Respondent

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(June 25, 1993)

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

J. Smith
United States Circuit Judge

APPENDIX E

EXCERPTS OF STATUTES AND RULES INVOLVED

Section 1332(a)(1) of Title 28 of the United States Code provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> * * * * *

Section 1441(a) of Title 28 of the United States Code provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Subsections (c) and (e) of 28 U.S.C. §1447 provide:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such action.
>
> * * * * *
>
> (e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Rule 701, Federal Rules of Evidence, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 702, Federal Rules of Evidence, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 15(a), Federal Rules of Civil Procedure, provides:

> (a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Section 2800.6 of Title 9 of the Louisiana Revised Statutes of 1950, as amended, provided at the time relevant to this action:

A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

B. In a suit for damages by a person who has suffered damages as a result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.

C. In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or clean-up of the area where the accident giving rise to the damages occurred.

D. "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. (Added by Acts 1988, No. 714, §1)